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THE ABDICATION OF FREE ASSOCIATION—ELEVATING THE COURT ABOVE THE CONSTITUTION IN *CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW V. MARTINEZ*

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IN *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, the Supreme Court incorrectly held that Hastings College of the Law (Hastings) did not violate the Constitution in imposing an "accept-all-comers" policy upon student groups seeking recognition as Registered Student Organizations (RSOs).[1] The majority arrived at this mistaken holding as a result of its selective application of the law. The issue of controversy in this case is the appropriate framework under which to review the policy and the constitutional claims against it.

Hastings offers an RSO program from which member organizations can derive numerous advantages.[2] Organizations with RSO status receive the following benefits: the receipt of financial assistance from the school; the use of channels of communication such as the weekly school newsletter, bulletin boards, and a school email address; the ability to participate in the yearly Student Organizations Fair; and the use of facilities and office space to host meetings and events.[3] In pursuit of these benefits, the Christian Legal Society (CLS) chapter of Hastings applied for status as an RSO in 2004.[4] As required, CLS included in its application a copy of the bylaws mandated by its national organization.[5] The bylaws

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1. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2978 (2010).
2. *Id.* at 2979.
3. *Id.*
4. *Id.* at 2980.
5. *Id.*

require every voting member and officer of the organization to sign and abide by a Statement of Faith, which CLS interprets as prohibiting sexual activity outside of a heterosexual marriage.[6]

To qualify for RSO status at the school, organizations must abide by Hastings's Policy on Nondiscrimination.[7] Hastings interprets this policy as an "all-comers" policy, meaning that any RSO "must 'allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs.'"[8] It is disputed whether this interpretation was in place at the time that CLS applied for RSO status.[9] Relying on the all-comers interpretation of the policy, Hastings refused to grant RSO status to CLS, marking the first denial of registration to a student organization in the history of the RSO program.[10] Inexplicably, Hastings had admitted other student organizations to the program whose bylaws plainly did not adhere to the all-comers policy.[11]

Shortly after this denial of RSO status, CLS filed suit under 42 U.S.C. § 1983 alleging violations of its "First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion."[12] The district court granted summary judgment for Hastings on all of CLS's claims.[13] On appeal, the Ninth Circuit based its two-sentence affirmation of the district court's decision on the fact that the parties stipulated to the existence of the all-comers policy and that the "conditions on recognition [were] therefore viewpoint neutral and reasonable."[14] In its decision on June 28, 2010, a 5–4 majority of the Supreme Court affirmed the Ninth Circuit's decision that Hastings's all-comers policy was constitutional and remanded for decision as to whether the policy as stated was mere pretext, "if, and to the extent, [that the argument was] preserved."[15]

The Court's correct, first step in reaching this conclusion was, like the Ninth Circuit, to rely upon the stipulation and analyze Hastings's actions under the school's interpretation of an all-comers policy rather than upon the Nondiscrimination Policy as written.[16] However, the Court then erroneously chose to lump CLS's separate free speech and associational free-

6. *Id.* Although the Court stated that CLS "exclude[d] from affiliation anyone who engages in 'unrepentant homosexual conduct,'" CLS only barred these individuals from voting membership or holding officer positions. *Compare id. with* Joint Appendix, vol. 1 at *226, Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971 (2010) (No. 08-1371), 2010 WL 372139.

7. *Martinez*, 130 S. Ct. at 2979. The policy provides, in pertinent part, that the school "shall not discriminate unlawfully on the basis of . . . religion, . . . sex or sexual orientation." *Id.*

8. *Id.*

9. *Id.* at 3003 (Alito, J., dissenting).

10. *Id.* at 3002.

11. *See, e.g., id.* (stating that the La Raza group "limited voting membership to 'students of Raza background'").

12. *Id.* at 2981 (majority opinion).

13. *Id.*

14. *Id.* (quoting Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, 319 F. App'x 645, 645–46 (9th Cir. 2009)).

15. *Id.* at 2982, 2995.

16. *Id.* at 2982–84.

dom claims together and to evaluate both under a limited public forum framework.[17] This flawed selection of the appropriate law enabled the Court to incorrectly decide the case in Hastings's favor.

The majority recognized the importance of the constitutional right to associate, citing its own precedent which mandates that restrictions on freedom of association remain subject to "close scrutiny," and permits them "only if they serve 'compelling state interests' that are 'unrelated to the suppression of ideas'—interests that cannot be advanced 'through . . . significantly less restrictive [means].'"[18] Nevertheless, the Court fashioned a justification for utilizing a singular, less restrictive public forum analysis for CLS's two distinct claims simply because it made more sense to treat the speech and association claims together.[19] Treating them separately made "little sense," according to the Court, for three reasons: (1) the same considerations that warranted less scrutiny in limited public forums for free speech apply to expressive association because the two claims are similar; (2) to apply strict scrutiny would nullify the purpose of limited public forums; and (3) unlike previous expressive association decisions, CLS was placed under indirect pressure, rather than compulsion, to include all comers.[20] In support of the latter assertion, the Court factually distinguished *Boy Scouts of America v. Dale*, where the State of New Jersey required the Boy Scouts to admit a homosexual gay rights activist in opposition to that organization's value system.[21] Although the *Dale* Court deemed New Jersey's action a violation of the Boy Scouts' right of expressive association, the *Martinez* Court drew a suspect distinction, claiming that, unlike New Jersey's action in *Dale* that mandated the inclusion of an unwanted member, Hastings's policy did not *force* the inclusion of unwanted members.[22]

Using the unsound decision not to distinguish CLS's free speech and expressive association claims as its jumping-off point, the majority was free to embark upon a public-forum analysis for both claims and found the RSO program to be a limited public forum.[23] To withstand constitutional scrutiny, restrictions upon a limited public forum must merely be "reasonable in light of the purpose served by the forum" and must be viewpoint neutral.[24] Regarding the "reasonableness" prong, although the Court recognized that it must not defer to the university when considering matters of constitutionality, it nevertheless engaged in a largely deferential review of Hastings's actions.[25] To reach the conclusion that the all-comers policy was reasonable in light of its stated purpose, the Court cited Hastings's goals of ensuring that "leadership, educational, and social

17. *Id.* at 2985.
18. *Id.* (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).
19. *Id.*
20. *Id.* at 2985–86.
21. Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).
22. *Martinez*, 130 S. Ct. at 2986.
23. *Id.* at 2984 n.12.
24. *Id.* at 2988 (internal citation and quotation omitted).
25. *See id.* at 2988–91.

opportunities afforded by [RSOs] are available to all students;" aiding the school in regulating the Nondiscrimination Policy; "encourag[ing] tolerance, cooperation, and learning among students;" and "declin[ing] to subsidize with public monies and benefits conduct of which the people of California disapprove."[26] Further, because the Court noted that the all-comers policy was an example of "textbook" viewpoint neutrality, it dedicated little time to that argument and ultimately held for Hastings on this second prong as well.[27]

Writing for the four dissenters, Justice Alito lamented the Court's holding as operating on a principle of "no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning."[28] Though the dissent dedicated time to several points that the majority dismissed, its correct result should have been supported by directly addressing the majority's arguments. As the majority noted, the dissent "spill[ed] considerable ink" arguing about the technicalities of "when the all-comers policy was adopted"[29] in an attempt to evade the stipulation on a technicality.[30] The dissent first argued that *Healy v. James*,[31] is almost factually indistinguishable from *Martinez* and should have controlled the decision before the Court, thereby resulting in an invalidation of Hastings's policy on free association grounds.[32] But, noting that the Court disregarded *Healy*, the dissent then conceded to undertake a limited public forum analysis to expose errors in the majority's reasoning.[33] Again straying to discuss a point that the majority rejected, Justice Alito began his discussion under the Nondiscrimination Policy.[34] Finally, though the ensuing analysis under the all-comers policy touched on CLS's free association claim and the standards under *Dale*, the dissent took issue with the majority's limited public forum analysis.[35] The dissent stated that each of Hastings's stated policies that the Court condoned[36] were not reasonable in light of the forum's purpose "to promote a diversity of viewpoints *among*—not within—registered student organizations."[37] Again addressing a point to which the majority assigned minimal importance, the dissent urged that the all-comers policy was mere pretext because it was not announced until the instant litiga-

26. *Id.* at 2989–90 (internal citations and quotations omitted).
27. *Id.* at 2993–95.
28. *Id.* at 3000 (Alito, J., dissenting).
29. *Id.* at 2982 n.6 (majority opinion).
30. *See id.* at 3005 (Alito, J., dissenting) ("What was admitted in the Joint Stipulation filed in December 2005 is that Hastings had an accept-all-comers policy. CLS did not stipulate that its application had been denied more than a year earlier pursuant to such a policy.").
31. Healy v. James, 408 U.S. 169 (1972).
32. *Martinez*, 130 S. Ct. at 3007–09 (Alito, J., dissenting).
33. *Id.* at 3009.
34. *Id.* at 3009–12; *see supra* text accompanying note 16.
35. *Martinez*, 130 S. Ct. at 3013–15 (Alito, J., dissenting).
36. *See supra* text accompanying note 26.
37. *Martinez*, 130 S. Ct. at 3016 (Alito, J., dissenting) (internal quotation omitted).

tion, was undocumented, and was not previously enforced.[38] The dissent contended that this issue should not be left for the Ninth Circuit to decide on remand because that court will likely not have the authority to review the issue due to the procedural posture of the case; instead, it should have been decided in the Supreme Court.[39]

The Supreme Court's results-driven selection and application of which legal standards to apply yielded an incorrect holding in *Martinez*. Moreover, while the practical and policy-based counterarguments in the dissenting opinion sustain the correct result, the legal arguments therein lack the full support that they could have been afforded. The major flaw in the majority's argument is that it conflates CLS's free speech and expressive association claims.[40] While the dissent merely touches upon this argument,[41] it should have been the basis upon which to correctly decide the case.

As a threshold issue, the majority correctly chose to analyze the case according to the stated all-comers policy instead of the written Nondiscrimination Policy in view of the Joint Stipulation.[42] While the dissent made an admirable attempt to dismantle the stipulation to reach the proper holding,[43] the all-comers interpretation of the policy was properly before the Court. But, the accuracy of the analysis ends there. While the Court itself noted that it has only "employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on *speech*,"[44] it nevertheless erroneously glossed over CLS's expressive association claim by offering three insufficient justifications for merging it with the free speech claim.[45] This error opened the door for the Court to analyze both claims under the lower level of scrutiny afforded to speech in a limited public forum.[46]

Instead, the Court should have treated CLS's expressive association claim as distinct from the free speech claim and subjected it to a higher level of scrutiny. The Court's first attempted justification for doing otherwise, based upon the similarity of the free speech and free association claims, lacks merit. The need for more stringent protection of expressive association is evident from the policy behind the constitutional right. Where the Court's decision to analyze the two claims together erroneously implies that freedom of speech considerations should swallow the expressive association claim, its own precedent holds otherwise.[47] The Supreme Court has recognized that "[t]he Constitution guarantees freedom of association . . . as an indispensable means of *preserving other indi-*

38. *Id.* at 3017–18.
39. *Id.* at 3019.
40. *See id.* at 2985 (majority opinion).
41. *See id.* at 3009 (Alito, J., dissenting).
42. *Id.* at 2982 (majority opinion).
43. *Id.* at 3005 (Alito, J., dissenting).
44. *Id.* at 2984 (majority opinion) (emphasis added).
45. *Id.* at 2985–86.
46. *Id.* at 2986.
47. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

vidual liberties,"[48] one of which is the freedom of speech.[49] If the freedom of expressive association was indeed granted with the aim of protecting other freedoms, it is nonsensical that the claims should be merged and analyzed under the same framework. Secondly, the Court's elevation of the limited public forum places greater importance upon that court-created entity than it does upon the constitutional guarantee of freedom to associate. Should constitutional freedoms be treated secondarily to judicial constructions, individual rights may be easily eroded and rendered meaningless. Finally, the Court's suspect distinction of *Dale*, citing "compelled" inclusion in that case that was supposedly absent in *Martinez*,[50] likewise fails to justify its decision to merge the claims. The alleged distinction is really no distinction at all. Mandating that an organization centered upon a belief system accept individuals as officers and voting members who do not adhere to its own beliefs is the very definition of "forced" inclusion. As such, *Martinez* falls squarely within the purview of *Dale*. Although the Court suggested that "the advent of electronic media and social-networking sites" mitigates the impact of non-recognized status upon CLS,[51] the inability to achieve RSO status on a law school campus strips an organization of any meaningful way to associate.

Because of the fundamental importance of expressive association, the Court should have adhered to precedent allowing infringements upon that right only when they "serve compelling state interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms."[52] In *Roberts*, the Court recognized that a government action that tries "to interfere with the internal organization or affairs of [a] group," qualifies as an unconstitutional infringement upon this freedom.[53] As even the *Martinez* majority admitted in a parenthetical, "'[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than' forced inclusion of unwelcome participants."[54] Because Hastings's policy imposed such forced inclusion upon CLS, it should have been prohibited from instituting the all-comers policy unless there were no means "significantly less restrictive of associational freedoms"[55] of achieving the RSO's goals. As it stands, the policy offers an organization a choice between diluting its belief system to an extent that would render its message meaningless or excluding it from recognized existence in a manner that would virtually extinguish it. Outside of forbidding all forms of association, it is difficult to think of a

48. *Id.* (emphasis added).
49. *Id.* at 622 ("An individual's freedom to speak . . . could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.").
50. *Martinez*, 130 S. Ct. at 2986.
51. *Id.* at 2991.
52. *Roberts*, 468 U.S. at 623.
53. *Id.* at 622–23.
54. *Martinez*, 130 S. Ct. at 2986 (quoting *Roberts*, 468 U.S. at 623).
55. *Roberts*, 468 U.S. at 623.

policy that is more restrictive upon associational freedoms. Even the original interpretation of the Nondiscrimination Policy operated less restrictively, as evidenced by the La Raza group's ability to organize under bylaws similar to what CLS proposed in this case.[56] That policy evidently achieved the RSO's goals, as it was never challenged prior to the instant litigation.

While ultimately the Court's narrowly tailored holding will not result in widespread changes, the immediate result thereof is to deny the Hastings chapter of CLS its constitutional right of expressive association. In a broader context, the holding sets a disturbing precedent for allowing the Court to defer to judicial constructions above constitutional freedoms.

56. *Martinez*, 130 S. Ct. at 3004 (Alito, J., dissenting).